

Li (Migration) [2018] AATA 696 (7 March 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Zidong LI
CASE NUMBER:	1615550
DIBP REFERENCE(S):	CLF2013/175706
MEMBER:	Russell Matheson
DATE:	7 March 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2)(c) of Schedule 2 to the Regulations; and • r.2.03A

Statement made on 07 March 2018 at 12:41pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – Registered de facto relationship – Financial aspects of the relationship – Joint bank account – Share daily expenses – Property and bills in the sponsor's name – Both contribute to mortgage payments – Inconsistent evidence regarding financial affairs – Borrowed substantial amounts of money from their family – Relationship is socially recognised by family and friends

LEGISLATION

Migration Act 1958, ss 5CB, 65, 359AA

Migration Regulations 1994 rr 1.09A, 2.03A Schedule 2 cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 5 September 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant is a 31 year old male national of China. He applied for the visa on 26 July 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied the applicant was the de facto partner of the sponsor. The applicant seeks review of the delegate decision.
4. The applicant appeared before the Tribunal on 20 December 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5CB of the Act.
8. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
9. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

10. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

11. As the parties are not validly married, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

12. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
13. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the de facto partner of the sponsor within the meaning of s.5CB of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.09A(3), and the reasons for its decision.
14. The Tribunal has considered the documentary evidence submitted with the application and the additional documentary evidence that has been submitted to the Tribunal. The Tribunal has also had the benefit of the applicant's and the sponsor's oral evidence. The Tribunal found the applicant and the sponsor at times not to be credible witnesses who presented contradictory and inconsistent evidence to the Tribunal particularly in relation to the financial aspects of their relationship.

15. Financial Aspects

16. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, especially in relation to major financial commitments, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses.
17. The applicant stated that he works for a travel company in Burwood and is paid \$500 per week cash. The sponsor said that she works as a bank teller and earns \$1500 a fortnight. The parties stated that they have a joint bank account with the Commonwealth Bank and the account is used for payment of utility bills, strata levy, intranet and day to day expenses. The parties provided documentary evidence of debits transactions occurring from their joint account. The applicant stated that he deposits his salary into the joint account and the sponsor transfers money into the joint account as well. The sponsor told the Tribunal she has her own personal account and there is an offset account attached to a loan account.
18. The sponsor stated that she purchased a property in Charles Street Canterbury for \$605,000 in November 2016. The parties provided documentary evidence of the purchase indicating that the sponsor had a mortgage with the Commonwealth bank of over \$540,000. The parties stated that they deposit 1600 dollars cash a month into the offset account to pay the mortgage. The parties provided no documentary evidence of this occurring and the Tribunal requested them to do provide bank statements indicating that this actually occurred by 15 January 2018. The parties stated that they rent out a room in their apartment to a student for \$255 per week to help pay the mortgage. The parties provided documentary evidence showing deposits into a fixed rate investment property loan with Westpac showing similar amounts being deposited for payments of the sponsor's loan. The parties also provided a documentary evidence of a rental tenancy agreement with Zixuan at Charles Street, Canterbury.
19. The Tribunal questioned the parties about unusually large of amounts of money being deposited into their joint account. The Tribunal questioned the applicant in relation to a deposit of \$40,000 into the parties' joint account on 30 August 2016 and two debits of \$20,000 occurring on 31 August 2016 and 2 September 2016. The applicant stated that the \$40,000 dollars was borrowed from his uncle for a deposit certificate and the two \$20,000 debits were repayments to the uncle for the loan. The Tribunal put the same question to the sponsor and she said that it was a private matter and did not want to comment. The sponsor

then responded that the \$40,000 was a gift from her parents for a deposit on the property she had purchased. Further stating that she did not have to repay the money to her parents. The Tribunal asked the sponsor if the parties had borrowed any large amounts of money from the applicant's uncle. The sponsor stated that they had borrowed some money from the applicant's uncle 7,000 to 8,000 thousand dollars to pay their agent. Further stating that the uncle had lent them 2,000 thousand dollars for the purchase of furniture. The sponsor then said that the uncle had not lent them any other money.

20. The Tribunal is mindful that during the hearing there were a number of significant inconsistencies in the parties' evidence in relation to their financial aspects, which cause the Tribunal to question the parties' credibility and the accuracy of their evidence.
21. These were discussed with the applicant in accordance with s. 359AA of the Act. The Tribunal informed the applicant that it wished to put new information that it would consider being the reason or part of the reason for affirming the decision. The Tribunal explained the relevance and the consequences of the information to the applicant and invited the applicant to comment on or to respond to the information. The Tribunal told the applicant that he may respond to the information orally or in writing. The applicant was also informed that he may seek additional time to comment on or respond to the information. The applicant informed the Tribunal that he wished to reply orally.
22. The Tribunal put to the applicant in accordance with s.359AA that the evidence given by the applicant and the sponsor in relation to the 40,000 dollars deposit into their joint was inconsistent and totally contradictory, being;
 - That the applicant said that the 40,000 dollar deposit on 30 August 2016 was a loan from his uncle and the two 20,000 dollar debits were repayment of the loan.
 - The sponsor stated that the 40,000 dollar deposit on 30 August 2016 was a gift from her parents for a deposit on a property she had purchased. Further stating that the parties had borrowed 7,000 to 8,000 dollars from the applicant's uncle to pay their agent and borrowed a further 2,000 dollars from the uncle to purchase furniture.
23. The applicant responded orally and stated that it had been a year and that his girlfriend may have forgotten about the loan. The Tribunal does not find the explanation given by the applicant in relation to the inconsistent and contradictory evidence given by the parties logical or plausible as to why large amounts of money were being deposited into the parties' joint account. The Tribunal has concerns as to the purpose and reasons for the deposits and is unable to identify who the deposits were from.
24. The Tribunal also requested that the applicant obtain a statement from his uncle to prove that he had in fact borrowed the money. The applicant provided a statutory declaration from his uncle Zhengping Yang dated 15 January 2018 outlining a number the personal cash loans that he had given to the applicant and the purpose for the loans and how the applicant repaid those loans. The Tribunal accepts that the applicant's uncle provided a number of personal loans to the applicant. The applicant also provided a statement dated 18 January 2018 from the sponsor's mother Xiaoqi Zhoua stating that she had lent her daughter 40,660 dollars for the second instalment for the parties' new apartment. The applicant also provided a statement dated 18 January from his mother stating that she asked her brother in Australia to support the applicant financially for his application fee for his AAT appeal and she would pay him back at a later date when he returned to China.
25. The applicant and sponsor provided no convincing evidence or reasons to the Tribunal to explain their contradictory and inconsistent evidence in relation to their financial affairs. The

Tribunal accepts that the parties have borrowed substantial amounts of money from their family for the purchase of their residential dwelling and household items.

26. The parties have no joint liabilities or major assets together. The Tribunal accepts that the parties share the day to day household expenses and they pool their financial resources. There is no evidence that either party in the relationship owes any legal obligation in respect of the other. The Tribunal places little weight on this aspect of the relationship due to the inconsistent and contradictory evidence given by the parties at the hearing.

27. Nature of the household

28. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
29. The couple gave detailed and consistent evidence about their living arrangements and the Tribunal is satisfied that they live together. The applicant and the sponsor spoke about sharing the household duties and responsibilities and individual tasks in detail. They provided consistent evidence of their living arrangements and details about their daily lives and employment. The parties stated that they have no documents in joint names such as utility bills or mortgage. All documents provided by the applicant to the Tribunal relating to the household are in the name of the sponsor and the mortgage is also in the sponsor's name. The parties stated this is because of the applicant's migration status.
30. The parties provided a considerable amount of documentary and photographic evidence for the purchase of household items purchased in joint names from the Good Guys for a front load washing machine, refrigerator, microwave oven, television, kettle and toaster. The parties also provided documentary evidence in the name of the sponsor for purchasing bedding and furniture addressed to the Charles Street, Canterbury address where they previously lived. The applicant also said that he had purchased a Maltese terrier dog for the sponsor.
31. The Tribunal accepts that the parties live together and that they have established a joint household. The Tribunal accepts that they share the responsibility of the household duties

32. Social aspects

33. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
34. The Tribunal accepts that the relationship is socially recognised by family and friends. There are statements given to the Department at time of application from a friend of the sponsor and the applicant's uncle who give little insight into the development of the relationship. The Tribunal places little weight on the statements.
35. The couple presented photographic evidence of their engagement party, travel overseas and their most recent trip to Melbourne in Easter 2017. They also produced photographic evidence of dining out with friends and attending various family and social events that they attended together. The parties stated that their recent social activities have been limited because of their work commitments.

36. Overall, the Tribunal is satisfied that the parties represent themselves to other people as being married to each other. The Tribunal is satisfied that in the opinion of friends and acquaintances they are in a genuine spousal relationship.
37. The Tribunal is satisfied they plan and undertake joint social activities and represent themselves to others as being in a genuine and continuing relationship. The Tribunal accepts that the parties' family and friends accept that they are living in a genuine and continuing relationship. The Tribunal is satisfied that there is family support for the relationship.

38. Commitment

39. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
40. The parties claim to have first met in February 2012 and entered into a committed relationship in March 2012. The parties registered their de facto relationship on 22 July 2013 in the state of New South Wales under the Births, Deaths and Marriages Act 1995. To date, the relationship has lasted for a period exceeding five years.
41. The applicant has previously provided evidence to the Department that he intended to marry the sponsor in 2013 and 2014. The applicant told the Tribunal that he intends to marry the sponsor on her birthday the 8 December 2018 and that he has registered his intention to marry her with a marriage celebrant. The applicant said that he did not marry the sponsor as previously planned because the parties were not ready and they did not have a stable income. Similarly the sponsor said that the parties now have a regular income now and are prepared to marry each other. The Tribunal accepts that they have an intention to marry in December 2018.
42. The applicant stated that he was not sure if the couple would have children because he has a genetic problem. Further stating that and there is a family history of Charcot Marie Tooth which impacts on his health. He said that he cannot run because of muscle weakness and that the sponsor sympathises with his condition and is there to care and support him. The applicant said that the sponsor has encouraged him over the past five years during difficult times related to his illness. The sponsor stated that applicant supported her emotionally when she was in a chaotic state of when his visa was initially refused because he managed all their financial affairs and they had recently purchased a property and the mortgage was in her name. The sponsor father stated that the parties care about each other and that the applicant had been of great help to her in her life and they are in a genuine relationship.
43. The Tribunal is satisfied the applicant and the sponsor provide each other a strong degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing spousal relationship. The Tribunal is satisfied the couple view their relationship as a long term one.
44. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations. The Tribunal is satisfied the parties provided each other a strong degree of companionship and emotional support that is commensurate with a couple being in a marital relationship.

45. Findings

46. Tribunal has concerns in relation to the inconsistent and contradictory evidence given by the applicant and sponsor in relation to the financial aspects of their relationship.

47. Overall, having considered all aspects of the relationship the Tribunal is satisfied that the weight of evidence supports that the applicant and the sponsor have a mutual commitment to shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together. Given these findings the Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship.
48. Given these findings the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of this decision. Therefore the applicant meets cl.801.221(2)(c).

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

49. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
50. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
51. The applicant has provided evidence that the relationship is registered under the Births, Deaths and Marriages Registration Act 1995 in the state of New South Wales on 22 July 2013 as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
52. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
53. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

54. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221(2)(c) of Schedule 2 to the Regulations; and
 - r.2.03A

Russell Matheson
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).